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No. 84-1732

In The
Supreme Court of the United States
October Term, 1984

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FREIGHT CHECKERS, CLERICAL EMPLOYEES AND HELPERS, LOCAL 856,

Petitioner,

vs.

BRENDA J. ALDERSON,

Respondent.

—o—

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

—o—

RESPONDENT'S MEMORANDUM IN OPPOSITION

—o—

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TABLE OF CONTENTS

Page

STATEMENT 1

REASONS FOR DENYING THE WRIT:

The Decision Of The Court Of Appeals Is A Conflict Between Different Panels Of The Same Court Of Appeals, Does Not Conflict With Any Other Court Of Appeals, And Is A Conflict Over An Issue That Is Narrowly Confined And Not Apt To Have Continuing Future Consequences. ... 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Barina v. Gulf Trading & Transportation Co. (CA9 1984), 726 F.2d 560 3

Chevron Oil Company v. Huson (1971), 404 U.S. 97 ..... 4, 5

DelCostello v. International Brotherhood of Teamsters (1983), — U.S. —, 103 S.Ct. 2281 ..... 3, 4, 5, 6

Edwards v. Teamsters Local No. 36 (CA9 1983), 719 F.2d 1036, *cert. denied*, — U.S. —, 104 S.Ct. 1599 (1984) 3, 5

Landahl v. PPG Industries, Inc. (CA7 1984), 745 F.2d 1312 5

McNaughton v. Dillingham Corp. (CA9 1984), 722 F.2d 1459, *cert. denied*, — U.S. —, 83 L.Ed. 2d 227 (1984) 5, 6

McNaughton v. Dillingham Corp. (CA9 1983), 707 F.2d 1042 4

Price v. Southern Pacific Transportation Co. (CA9 1978), 586 F.2d 750 5

Singer v. Flying Tiger Line, Inc. (CA9 1981), 652 F.2d 1349 ..... 4, 6

United States ex re. Robinson v. Johnston (1942), 316 U.S. 649 4

Waley v. Johnston (1942), 316 U.S. 101 4

Wisniewski v. United States (1957), 353 U.S. 901, 77 S.Ct. 633, 1 L.Ed.2d 658 4

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

California Code of Civil Procedure Section 338 3

California Code of Civil Procedure Section 1288 3

Harlan, *Manning the Dikes* (1958), 13 Record NYCBA 541 ..... 4, 5

Stern, *Denial of Certiorari Despite a Conflict* (1953), 66 Harv L Rev 465 5

Rules of Federal Procedure, Rule 17 4

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RESPONDENT'S MEMORANDUM IN OPPOSITION

STATEMENT

Respondent Brenda Alderson was a long time employee of Crescent Truck Lines ("Crescent"), being employed at various clerical positions from 1973 until her layoff on September 4, 1981. During this period, Alderson's positions were covered by a collective bargaining agreement between Crescent and Petitioner Freight

Checkers, Clerical Employees and Helpers Local 856 ("Local 856"). In July 1981, prior to her ultimate layoff, the clerical position she had occupied with Crescent was abolished, and she exercised her seniority to be demoted or "bump" into a code clerk position. However, she was given incorrect coding instructions and was not given proper training.

On September 2, 1981, Alderson was told by the company that she would be laidoff, allegedly because she could not do the job. Alderson immediately initiated the grievance procedure by notifying her business agent at Local 856. A meeting was held between management and the union on September 2, 1981. Alderson was not notified about the results of the meeting. Alderson finally was able to reach her business agent by telephone on September 9, 1981, after repeated efforts. The business agent was hostile and angry and told Alderson that the union would not process the grievance further. No explanation was given.

Alderson filed a complaint against Crescent and Local 856 in the United States District Court for the Northern District of California on April 19, 1982. Alderson's complaint alleged that she was wrongfully terminated by Crescent and that Local 856 breached the duty of fair representation when it refused to process her grievance.

On motions for summary judgment in the district court, Crescent and petitioner argued that the complaint was barred by the statute of limitations. The district court ruled for Crescent and petitioner, concluding that the applicable statute of limitations for both defendants

was the 100-day limitation under California Code of Civil Procedure Section 1288. Pet. App. A-6-7.

The Court of Appeals for the Ninth Circuit reversed as to the dismissal of the complaint against Local 856, holding that respondent's action against the union was "governed by the three-year period of limitations of Section 338(1) of the California Code of Civil Procedure (action upon liability created by statute). *Barina v. Gulf Trading & Transportation Co.* (CA9 1984), 726 F.2d 560, 562; *Edwards v. Teamsters Local No. 36* (CA9 1983), 719 F.2d 1036, 1040, *cert. denied,* — U.S. —, 104 S.Ct. 1599 (1984)." App. A-2. Finding that the three-year period of limitations was applicable, the court refused to give retroactive application to *DelCostello v. International Brotherhood of Teamsters* (1983), — U.S. —, 103 S.Ct. 2281. Pet. App. A-2.

Petitioner's petition for rehearing was summarily denied on February 4, 1985. Pet. App. A-4.

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REASONS FOR DENYING THE WRIT

The Decision Of The Court Of Appeals Is A Conflict Between Different Panels Of The Same Court Of Appeals, Does Not Conflict With Any Other Court Of Appeals, And Is A Conflict Over An Issue That Is Narrowly Confined And Not Apt To Have Continuing Future Consequences.

1. Petitioner seeks review most "importantly" because, it contends, two decisions of the Ninth Circuit conflict with the decision of the Ninth Circuit panel in the

instant case. This argument is squarely rejected under Rule 17. Rule 17.1(a) contemplates a conflict between decisions of two or more courts of appeals, and not conflicting decisions of panels within a circuit. See *Wisniewski v. United States* (1957), 353 U.S. 901, 902, 77 S.Ct. 633, 1 L.Ed.2d 658; Harlan, *Manning the Dikes* (1958), 13 Record NYCBA 541, 552. Such conflicts are left to the court of appeals itself to resolve.

The essence of the dispute petitioner seeks to have reviewed is the Ninth Circuit panels' disagreement as to whether the three-year or the 100 day statute of limitations was the applicable statute against unions in California for duty of fair representation cases arising during the brief period between its decision in *Singer v. Flying Tiger Line, Inc.* (CA9 1981), 652 F.2d 1349 and its decision in *McNaughton v. Dillingham Corp.* (CA9 1983), 707 F.2d 1042. This is clearly insufficient grounds to grant the writ.

Petitioner's reliance on *United States ex re. Robinson v. Johnston* (1942), 316 U.S. 649 is completely erroneous. There the Court granted certiorari and summarily remanded the case because of its parallel decision in *Waley v. Johnston* (1942), 316 U.S. 101, involving the same issues.

2. Petitioner claims that the decision below is in conflict with other circuit courts of appeals because they have decided differently on the retroactivity of *DelCostello*. This argument totally ignores the fact that all the courts of appeals have to apply the principles set forth in *Chevron Oil Company v. Huson* (1971), 404 U.S. 97, to the unique contexts facing their circuits. To not do so

would bring them in conflict with this Court's decision on the issue of retroactivity. Thus there is no conflict among the circuits since all the circuits including the Ninth Circuit resolved the retroactivity question by weighing the three factors specified in *Chevron* to the unique situations in their circuits.

The situations were vastly different among the different circuits. For example, in the Ninth Circuit, a three year statute of limitations had been firmly established in *Price v. Southern Pacific Transportation Co.* (CA9 1978), 586 F.2d 750, while in the Seventh Circuit there had been no previous statute of limitations established except an unstable decision of the Wisconsin Supreme Court. *Landahl v. PPG Industries, Inc.* (CA7 1984), 745 F.2d 1312. Obviously applying the same standards to different situations would result in different conclusions, but does not constitute a conflict among the circuits.

The fact that this Court has denied certiorari twice on this same issue in *McNaughton v. Dillingham Corp.* (CA9 1984), 722 F.2d 1459, *cert. denied,* — U.S. —, 83 L.Ed.2d 227 (1984) and *Edwards v. Teamsters Local Union No. 36* (CA9 1983), 719 F.2d 1036, *cert. denied,* — U.S. —, 104 S.Ct. 1599 (1984) would indicate that frivolousness of the Petition.

3. If there is arguably a conflict between the decisions of the courts of appeals, the impact of the conflict is narrowly confined and is not apt to have continuing future consequences. Certiorari should not be granted in this situation. Harlan, *Manning The Dikes* (1958), 13 Record NYCBA 541, 552; Stern, *Denial of Certiorari Despite a Conflict* (1953), 66 Harv L Rev 465, 470. This case

clearly involves an issue that will no longer be a live one since the limited number of cases involving the retroactivity of *DelCostello* has just about been exhausted. Petitioner has further narrowed the issue to involve cases only arising between the Ninth Circuit's decisions in *Singer* and *McNaughton*. This is clearly not an important issue that warrants review by this Court.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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